

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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HARALD McPIKE :
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 Plaintiff :
 :
 :
 versus : Civil Action Number
 :
 ZERO-GRAVITY, et al : 1:17-CV-562
 :
 Defendants.:
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February 23, 2018

The above-entitled Motions Hearing was continued
before the Honorable John F. Anderson, United States District
Magistrate Judge.

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IT REPRESENTS TESTIMONY AND PROCEEDINGS OF
THE CASE AS RECORDED.

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P R O C E E D I N G S

(Call to order of the Court at 10:21 a.m.)

THE DEPUTY CLERK: Harald McPike versus Zero-Gravity Holdings, Inc. et al. Civil Case Number 1:17-CV-562.

MR. PUSCH: Good morning, Your Honor. Dustin Pusch from the law firm of Clare Locke on behalf of the plaintiff, Harold McPike.

I'm here with my colleague, Paul Koepp, from the law firm of Seward & Kissel also on behalf of Harold McPike.

THE COURT: Thank you.

MR. POTEAT: Good morning, Your Honor. Kennon Poteat and Shawn Douglas of Williams & Connolly for defendants Eric Anderson and Tom Shelley.

MR. QUILTY: Kevin Quilty for co-defendants, Zero-Gravity Holdings.

THE COURT: Okay. Thank you. All right. Well I've read everybody's pleadings related to this issue. And, you know, I guess we're now down to eight unique documents. Then, the limitation now has been, as I understand it, really to the identity of the one client who has a current pending agreement and the lists of prospective customers, all of which relate to a time period after March of 2015 when the agreement with Mr. McPike had been terminated.

MR. PUSCH: That's correct, Your Honor. I think the party's have worked diligently with one another to try to

1 narrow this as much as possible.

2 But what is at issue right now is the identity of
3 this circumlunar client. And to be clear, this is the client
4 who replaced the plaintiff on this circumlunar trip. Mr.
5 McPike his contract was terminated by Space Adventures and the
6 defendants. And soon thereafter they began looking for new
7 clients. They found, apparently, this other client and I
8 believe they also are sticking -- considering other
9 prospective clients. I think those are at issue as well.
10 It's unclear whether or not the redactions are just the
11 current circumlunar client or it's a circumlunar client and
12 some other prospective clients as well.

13 But the -- I believe that there was a lot of motion
14 practice with regards to whether relevancy -- or whether
15 redactions for relevancy and confidentiality in general are
16 proper. I think at this point we are now at the fact that
17 this information, this circumlunar client, is relevant to this
18 action and therefore the redactions are improper.

19 THE COURT: Tell me why you think an agreement with
20 somebody who has entered into after March 25, which was two
21 years after he entered into the agreement or almost two years
22 after he actually entered into the agreement, that the actual
23 identity of that person is relevant.

24 MR. PUSCH: Well, the fact of the matter is that
25 plaintiff Harold McPike, the most blatant example of why it's

1 relevant, is with punitive damages. It's well settled. The
2 Supreme Court has -- the Eastern District of Virginia has
3 determined, as affirmed by the Fourth Circuit, that behavior
4 with regards to other people -- other customers after the
5 fact, that is relevant to whether or not the fraudulent
6 behavior or the behavior that would yield punitive damages has
7 been continued. It's been persistent and it's been repeated.
8 And it's not so much the identity of this individual is so
9 critical, it's what -- we are entitled -- Mr. McPike is
10 entitled to probe what that individual knows.

11 Now regarding confidentiality, we're not going to
12 disclose any confidential information, but we need to be able
13 to reach out to this individual and say: Do you know who Mr.
14 McPike is? Has -- you know, are you familiar with Space
15 Adventures?

16 THE COURT: There's already been deposition
17 testimony that this my -- and I may be misreading this, but
18 the way I read it was that this lawsuit had been discussed
19 with this individual. Am I misstating that?

20 MR. PUSCH: That's their testimony. I would -- I
21 would say that we -- the -- the defendants want us to take
22 their own party's and their party's representatives word for
23 what was discussed. Mr. McPike is entitled to pressure-test
24 what the defendants are saying by asking this third party, you
25 know: What did you discuss? What are the parameters of your

1 agreement? Are they still claiming that Roscosmos has an
2 agreement with them? Are they not? Is it persistent
3 behavior?

4 The contents of their agreement is relative to the
5 punitive damages claim in this case that they are still
6 persisting on claiming they have agreements that they don't
7 have and duping additional clients out of money.

8 THE COURT: One other individual.

9 MR. PUSCH: One other individual. That's relevant
10 to punitive damages. Their persistent behavior.

11 THE COURT: How do you think you're going to get any
12 of that information since discovery is over in seven hours?

13 MR. PUSCH: Well, I think we're entitled to contact
14 that individual. If that individual is in Virginia, they're
15 under the subpoena power, we can still call them as a witness
16 for trial. Simply because we haven't deposed them or gotten
17 documents from them, we're still entitled to pressure-test
18 what that individual knows. Is it the same thing that the --
19 the defendants are claiming that they've discussed with this
20 individual? Are the parameters of his contract, as they're
21 just claiming, it's the not the same, it was never discussed,
22 anything similar? We're entitled to pressure-test what the
23 defendants are saying about that.

24 THE COURT: Well, if this is so significant to you
25 as you -- as you have made it out to be over the last seven

1 days, when you found out in December that they were going to
2 be redacting the names of people and when you found out on
3 January 2nd when some of these documents were actually
4 produced with the redactions, why didn't you bring it to the
5 Court earlier?

6 MR. PUSCH: Well, Your Honor, I would say that
7 there's one thing about redacting documents and it's quite
8 another about instructing witnesses not to answer the --

9 THE COURT: We're not here on a motion to compel and
10 answer to a deposition. We're here to produce a document,
11 with a -- without a redaction that you've had since January
12 2nd. So, you know, this thing like they just didn't answer a
13 question in a deposition last week now makes this a timely
14 motion, I don't understand at all. So help me understand why
15 you think a motion to compel, the production of a document
16 that you have had in your possession since January 2nd,
17 becomes timely when a witness doesn't answer a question last
18 week?

19 MR. PUSCH: Well, I think, Your Honor what we
20 want -- the issue really became ripe for us to really push for
21 when defendant Anderson refused to answer the question. When
22 that happened, we understood that we had no more avenues by
23 which to discover this information. At that point we decided
24 that -- that was the last recourse to do this without the
25 Court's intervention. And that's why we're seeking the

1 documents now.

2 If they -- Your Honor, it sounds like the 30(b)(6),
3 had we asked for that, that might have been something that
4 would be more appropriate. We have asked for --

5 THE COURT: It would have been timely. I'm not
6 saying it would have been more appropriate. You've known
7 about this issue clearly since the end of December. You've
8 been sending e-mails back and forth about it since December.
9 You got a document, at least two of the eight documents that
10 are subject to this -- three of the eight documents that are
11 subject to this motion today, were produced to you on January
12 2nd with redactions. You could have, if this was as
13 significant as you now indicate that it was, had a good faith
14 consultation and said, you know, within a week's period of
15 time brought that to the Court's attention and gotten a
16 decision.

17 MR. PUSCH: Yes, Your Honor. I would say that you
18 know, that given the time pressure of this Court, how quick it
19 is, and we appreciate that, you know, there certainly could
20 have been a more timely motion on it. But, what really
21 happened was at the deposition on February 12th, when the
22 defendant Anderson was instructed not to answer this question,
23 that signaled to us that this -- they're not going to respond
24 to this in a deposition.

25 We've always understood that there was a difference

1 between what they were willing to produce in a document and
2 what they were willing to answer a direct question and
3 instruct against relevancy in a deposition. When that
4 happened, that's when we understood that we are out of options
5 within the discovery process without Court's intervention to
6 obtain this information. And that's when we moved the Court
7 for this information or we began our meet and confer with the
8 defendants on this issue.

9 I also wanted to note that we've withdrawn this
10 motion as to Zero-Gravity, defendant Zero-Gravity. There was
11 some confusion about whether or not who had possession or
12 control over these documents, but the -- it may have been my
13 confusion -- but we've withdrawn this over Zero-Gravity. So
14 it's just defendants Shelley and Anderson and then Space
15 Adventures.

16 THE COURT: Well, help me understand, and again I've
17 read the e-mail chain that you all have attached as Exhibit 12
18 and maybe Exhibit 11 back and forth. How having read the
19 party's positions relating to the documents -- how could it
20 have come as a surprise that they weren't going to disclose
21 the identity of the customer.

22 MR. PUSCH: Well, I think that again that comes down
23 to what we perceive as a big difference between producing a
24 document and answering a question and then instructing not to
25 answer a question based on relevance in a deposition. You can

1 object to a request for production for relevance and then the
2 party's can meet and confer on that and resolve that issue
3 between themselves, which is what happened. We maintained our
4 objection for relevance over the request for production when
5 it was made with regards to this issue, but objecting for
6 relevance in a deposition, particularly where an individual is
7 doing the same exact trip or a very similar trip, and replace
8 the plaintiff on the very trip that's at issue in this case,
9 we were, quite honest, taken aback by that instruction in a
10 deposition.

11 And that's why when we saw that we realized that we
12 were out of options within the discovery process without the
13 Court's intervention. And that's when we began meeting and
14 conferring again with the defendants on this issue. But
15 that's -- we were genuinely taken by surprise that they would
16 instruct a witness not to respond for relevance in a 30(b)(6)
17 deposition that was part of one of the topics that was agreed
18 to.

19 THE COURT: And just so it's clear, it wasn't just
20 relevancy, it was confidentiality.

21 MR. PUSCH: Confidentiality.

22 THE COURT: And that --

23 MR. PUSCH: And there is a protective order in this
24 case that --

25 THE COURT: But the defendants -- it's a one-tier

1 protective order. Right? So anything that's produced under
2 the protective order Mr. McPike would be able to see?

3 MR. PUSCH: Yes, but that was agreed to by the
4 parties.

5 THE COURT: But when the parties entered into that
6 agreement, they didn't say: And we're going to provide you
7 with our customer list. And at the time they didn't know the
8 situation of what was discussed in the opposition having to do
9 with his current negotiations and the possible impact of what
10 could happen if that customer was disclosed to other people.

11 MR. PUSCH: Well, I think that the defendants always
12 knew that their client list was sensitive, that they're
13 claiming now. That they knew they had competitors. I don't
14 think that's a shock to them.

15 They knew that Mr. McPike had an interest and an
16 ongoing interest based on the complaint of going to the moon.
17 I don't think that it was a surprise to them. But I also
18 think, Your Honor, if it makes sense, then this needs to be
19 produced in attorney's eyes only. Mr. McPike is not
20 interested in using this for his own benefit as the defendants
21 have claimed. We are interested in using it for this
22 litigation only. And if it needs to be attorney's eyes only,
23 we're open to that. We don't know why the defendants
24 didn't -- why they agreed to a confidentiality or a protective
25 order without that. I think it's a little bit of buyer's

1 remorse. But we are interested in the information in whatever
2 form we can get it for this litigation only.

3 THE COURT: Okay. Let me hear from who's going to
4 argue on behalf of the individual defendants?

5 MR. POTEAT: So, Judge, we told opposing counsel
6 that we were not disclosing the identity of the current client
7 or any prospective clients at the end of December. So they've
8 known that that information, from our standpoint, was off
9 limits and we reached a compromise on it. And they didn't
10 pursue it until recently.

11 THE COURT: Well, they have pursued it through -- I
12 mean these e-mails go back and forth until February 14th or
13 15th. I mean there's, you know, we're going to redact; no
14 you're not; yes, you should; no, you shouldn't. I mean, so
15 it's not like they in December they said okay that's fine with
16 us.

17 They didn't bring a motion. I'll --

18 MR. POTEAT: They didn't bring a motion. And when
19 we responded to the discovery request, we put in there what we
20 were agreeing to do and we said this is based on a compromise.
21 I understand in their reply they say that they reserved their
22 rights, but I think their conduct indicates otherwise in terms
23 of the relevance. And especially their claim now that it's
24 highly relevant. Frankly, we just don't think that can be
25 accepted at that point.

1 If this information was highly relevant or a theory
2 of recovery depended upon it, a party would plead it in their
3 complaint. And Mr. McPike didn't do that. If the information
4 is highly relevant, a party would serve an interrogatory on it
5 on the first day fact discovery opened to seek the identities
6 of these people. Mr. McPike did not do that. If it was
7 highly relevant, a party would ask the defendant about it in a
8 deposition. They deposed defendant Shawn Shelley in January.
9 They left two hours on the clock for the deposition. Not once
10 did they ask him the identity of the current client or any
11 other prospective clients. And then they deposed defendant
12 Eric Anderson on February 9th the same day that we were in
13 here arguing a motion two weeks ago. They didn't ask him that
14 question either. So the timing here is particularly suspect
15 because Your Honor granted a motion on February 9th compelling
16 them to disclose documents that they had improperly withheld
17 on privilege. Mr. Mawdsley was excused from the deposition
18 that day because he was appearing as counsel when he was not
19 licensed. Mr. McPike was there too. And something happened
20 that weekend that has changed the tone of discovery in this
21 case in a negative way. And it was on the following Monday
22 that they asked that question and they knew they were going to
23 get an objection to it, because we had told them that it was
24 off limits in December. And that's what started the chain of
25 e-mails.

1 So we refused to answer the question on February
2 12th, the Monday after that ruling. And then on -- on
3 Wednesday, February 14th is when we first heard the request to
4 unredact certain documents.

5 THE COURT: I -- and you know they've redacted and
6 then they sent you some documents without the redactions and
7 they filed this motion. You know, but we've got to get to the
8 heart of what -- what we're talking about.

9 Help me understand what documents you have produced
10 relating to -- I mean this draft for discussion document that
11 was part of the package that was exhibit -- the exhibit with
12 the documents that were in dispute -- where you got the
13 redaction on the -- I'm looking at 41-44 and 41-45 and 41-46.
14 At least part of that appears to be discussions relating to
15 the agreement or issues having to do with the agreement with
16 the client, is that right?

17 MR. POTEAT: That is correct. It's my understanding
18 that this is a -- a draft for discussion, questions for
19 Energia as it relates to the current client.

20 THE COURT: What other documents -- I guess what I'm
21 trying to find out is, was the written agreement between the
22 current client asked for and produced in discovery in a
23 redacted format?

24 MR. POTEAT: We agreed to produce in our responses
25 information relating to other clients up to the time of Mr.

1 McPike's default on his contract. So the --

2 THE COURT: Let me ask you. When you actually
3 defaulted or when you terminated in March of 2015?

4 MR. POTEAT: At the time of termination. So March
5 of 2015. And that's where we cut it off. We realized that
6 certain documents after that date, so this is the document
7 that you reference from May of 2017, were produced. We took a
8 broad cut at responsiveness when we produced documents in this
9 case.

10 And so, I will tell you I have a small thin binder
11 that has the documents with the current redactions on them
12 with a blue sheet and then you follow and the unredacted copy
13 is behind it in case you would want to review in camera to see
14 the exact information that has been redacted. You know the --
15 the argument they have made as to relevant on punitives. So
16 aside from the timing issue.

17 You know the only real hook -- the only potential
18 hook that they could have for this, I think would be if -- if
19 similar representations and warranties were made in the
20 current contract for the current client. And the testimony
21 from the general counsel of Space Adventures and from the
22 president of Space Adventures that that -- that there is no
23 similar representation of warranty.

24 Counsel on the other side doesn't want to take their
25 word for it. I have those agreements here. We're happy to

1 submit them in camera as well for your review so that you can
2 confirm that. I mean the representations is not the same.
3 And so there's no hook that this could possibly be relevant at
4 this point to open up a trove of discovery on the last day
5 when frankly on proportionality grounds, at this point, it's a
6 \$7 million claim. Extensive discovery has already occurred,
7 both in terms of documents and depositions. They've had the
8 deposition of the other circumlunar client who is set to fly
9 with Mr. McPike. They took that deposition. We traveled to
10 San Francisco for it two weeks ago.

11 THE COURT: All right. I've read what you've
12 provided on that.

13 MR. POTEAT: They have had the opportunity there.
14 And frankly at this point it is a -- it's a \$150,000,000
15 contract here that they are attempting to interfere with at
16 this late stage, which they know is extremely sensitive, the
17 core sensitive information of Space Adventures. And it seems
18 to be more of a play for leverage than a play for actual
19 discovery of information for use in the case. But we do have
20 those documents if you'd like to review it.

21 I note in their reply they do not dispute that the
22 information is highly confidential and they don't dispute that
23 if disclosed harm would result, serious harm. Both to --

24 THE COURT: It's disclosed outside the stretchers of
25 the protective order. They've acknowledged that. I mean if

1 it's disclosed on the terms of the "protective order" and no
2 one discloses it outside the parameters of the protective
3 order or uses it for any other purposes other than this
4 litigation, then there wouldn't be harm. Right?

5 MR. POTEAT: Well, I do think it would be harm on
6 the third party client who would be brought into this. But,
7 in terms of the protective order, I understand that they say
8 well that should be enough. Well, there's plenty of case law
9 out there that we've cited where even when you have a
10 protective order it provides, you know, certain protections
11 for governing all of discovery in a case when there are
12 documents that involve particularly sensitive information that
13 doesn't have relevance that redactions of it are proper. And
14 I note it's an odd timing as well for Mr. McPike to be
15 claiming that the protective order gives all the protection we
16 need when last night he challenged two of our confidentiality
17 designations. They're going to file a motion challenging
18 confidentiality designations today by the end of business.

19 And so it seems to me I think I know where this is
20 heading. And the next motion to follow is going to be a
21 confidential- -- confidentiality designation challenge to this
22 information if it is indeed ordered to be disclosed.

23 Also, I think it's important when considering the
24 protective order the protection it affords. Mr. McPike has
25 testified in his deposition that he admitted to breaching

1 confidentiality obligations that he owed to us. And sometimes
2 information designated confidential under a protective order
3 gets disclosed through inadvertence. And so I'd note, at
4 least what we have been able to gather, when Mr. McPike's
5 counsel filed their motion to seal and attached documents that
6 at the time designated "confidential" by us, they filed it on
7 the public docket. I'm sure that was by inadvertence, but
8 that information can leak once it's out there. And so we just
9 don't think, in particular with this sensitive level of
10 information with the confidentiality issues at play that that
11 affords enough protection and that it ought to be -- and that
12 it ought to be permitted to be redacted in the limited
13 narrowly tailored form that we have found.

14 THE COURT: All right. Let me give you the final
15 word.

16 MR. PUSCH: A lot to respond to there. First of
17 all, it was our understanding that the sealing filed was filed
18 so that the attorneys can see it only. And if we are
19 incorrect there, then we will safeguard that in the future.
20 But our understanding was that that motion was filed and it
21 was allowed to be seen by attorneys under the Eastern District
22 of Virginia process. We'll double check that. But that's our
23 understanding of that.

24 As far as challenging confidentiality, well, we are
25 entitled to challenge confidentiality. If it's confidential,

1 we're not going to win and it's going to remain confidential.
2 So I don't think that that's really an issue. I also don't
3 think that we are filing a motion to challenge
4 confidentiality. We're in discussions with the other side
5 about that. We're filing a separate motion, I believe, today
6 about their production of 1500 pages of documents in the final
7 week of discovery 50 days afterwards. But that's for another
8 day.

9 This is not just about also what was in the
10 contract. This is -- there's a fraud claim. There is a
11 Virginia consumer protection act claim. Those claims are
12 about misrepresentations of the goods and services they're
13 offering. It's not necessarily limited to the contract. If
14 they promised this circumlunar client something outside of the
15 contract that is similar or identical to what they've promised
16 Mr. McPike or they haven't offered it to Mr. McPike, that
17 would show that you know they realized what they were doing
18 was wrong. But we're allowed to pressure-test what they have
19 promised and whether it's consistent with the fraudulent
20 behavior that they engaged in with Mr. McPike. And so it's
21 not just about what's in the contract. We would love to see
22 the contract to confirm and pressure-test what they -- their
23 own party witnesses have said about it, but it is not just
24 about the contract.

25 I'm not sure I understand what the harms of the

1 third party might be if it's not disclosed outside of the
2 protective order. The third party is welcome not to answer
3 questions. We are -- again, we are not allowed to disclose
4 this outside of this litigation. We will abide by that. We
5 will stringently attest to that and abide by that protective
6 order. So I don't think that there is a fear of that either.

7 THE COURT: -- calling him up and saying I now know
8 what you've done and I want to talk to you --

9 MR. PUSCH: I don't think we --

10 THE COURT: -- cause some harm.

11 MR. PUSCH: I don't think we will phrase --

12 THE COURT: I'm waiting to hear it.

13 (The Court and counsel simultaneously speaking.)

14 MR. PUSCH: Are you familiar with Mr. McPike? Are
15 you familiar with Space Adventures? How are you familiar with
16 him?

17 THE COURT: Well --

18 MR. PUSCH: If he's in Virginia though, we can also
19 subpoena him for trial.

20 THE COURT: And you think that's something that you
21 would be looking forward to?

22 MR. PUSCH: No, I suppose --

23 THE COURT: I --

24 MR. PUSCH: -- testimony, but --

25 THE COURT: I --

1 (The Court and counsel simultaneously speaking.)

2 MR. PUSCH: But, if he has relevant information,
3 then Mr. McPike is entitled to that.

4 THE COURT: And again, let's go back to how relevant
5 is information about their negotiations with a client
6 following their negotiations with Mr. McPike.

7 So Mr. McPike entered into an agreement in 2013, is
8 that right?

9 MR. PUSCH: That's right, 2013, yes.

10 THE COURT: 2013. And so there were negotiations
11 back and forth as to what was going to be done and who had
12 certain obligations and certain representations. And he made
13 his \$7 million deposit. As time went on in 2014 things
14 changed and there were discussions about trying to modify the
15 agreement that he had. Didn't get worked out. March of 2015
16 Space Adventures cancels the contract, right?

17 MR. PUSCH: Yes.

18 THE COURT: Okay. So I'm still -- we're getting
19 back down to, you know, where is it that the negotiations with
20 someone who comes in after the fact, that is everything that
21 happened to Mr. McPike, it happened. All of the
22 representations that have been made, all the statements done,
23 all the signing, money paid, termination done, how what they
24 did with somebody, six months, year, however long later,
25 really is relevant to Mr. McPike's claim in this case?

1 MR. PUSCH: Yeah, and I think that the -- as I've
2 explained, it exhibits a pattern of behavior.

3 THE COURT: So you're saying one additional action
4 could be a pattern?

5 MR. PUSCH: I think that -- well to the extent I
6 also mentioned that they have not -- they told us that it's
7 current and prospective clients.

8 THE COURT: Right. They have a customer list.

9 MR. PUSCH: So that could be more than one. That
10 could be a persistent and repeated behavior. But even more
11 than one, this really comes down to what the Supreme Court
12 decided in the *BMW* case and the Eastern District of Virginia
13 in the *Ebersole* case. In the *Ebersole* case, it was noted that
14 a significant factor in the assessment and in position of
15 cumulative damages was evidence that defendant had ever
16 engaged in similar conduct with respect to any other person is
17 a highly persuasive factor to the assessment of punitive
18 damages. And so that's -- that -- Mr. McPike punitive damages
19 claim, that's a highly persuasive factor as to what --

20 THE COURT: Consistent course of conduct, I mean is
21 what -- what you would need to, in most instances, to boost
22 your claim for punitive damages. Mr. McPike has a stand alone
23 independent claim for punitive damages.

24 MR. PUSCH: Yes.

25 THE COURT: And anybody else whose gotten hurt. If

1 he says it was willful and can show willfulness and other
2 instances of bad conduct, he would be entitled to a punitive
3 damages claim without any other -- so you're talking about how
4 punitive. And part of that is, you know, persistent course of
5 conduct and financial wherewithal or what is it that has to be
6 done to punish the person.

7 MR. PUSCH: Yes.

8 THE COURT: So help me understand how a one -- one
9 client discussion in contract can be turned into a persistent
10 course of conduct.

11 MR. PUSCH: Well, I will respond in two ways to
12 that. One is that, as the defendants have a knowledge, this
13 is not a high volume business. This is we get a client and
14 that client is going to pay \$150,000,000 for a product. We
15 may get two clients on that. It's a very low-volume,
16 high-cost business. And so the persistent behavior relative
17 to this type of business would be a small client base.

18 Secondly, the defendants are still representing and
19 lying -- are misrepresenting on their website that there's a
20 circumlunar trip and it's going to happen before the end of
21 the decade. They admitted in testimony that that ain't true.
22 And that's why it's more than just what this -- this new
23 client would give weight to that misrepresentation that still
24 exist on their website about this trip. And that's why it's
25 critical. But it also is circumstantial evidence to the

1 general fraud and Virginia Consumer Protection Act claims in
2 that it shows -- the persistent behavior shows that it's more
3 likely that they were misrepresenting these things to Mr.
4 McPike as well. The punitive damages claim is really the crux
5 of how this is so highly persuasive and relevant in this case.

6 THE COURT: Well, this has -- this case has come up
7 with some very interesting issues over its lifetime in our
8 court so far and I suspect we'll probably still have some
9 before it gets resolved.

10 And there are a couple of components to this. The
11 first is, I -- the argument about whether you can redact or
12 not redact. And I think, you know, it is not inappropriate
13 for redactions to be done to documents when there is both a
14 relevancy and a confidentiality concern. I agree that if it
15 was just relevancy it might be some difficulty in establishing
16 that it is the party whose done the redactions obligations to
17 establish while those redactions were done and that they were
18 appropriate. And I sincerely appreciate the party's working
19 together to get this down to the one narrow issue. To the
20 narrow issue that it has become. And that is, you know, the
21 actual identity of the client and prospective customers.

22 So first, you know, I'm not making a wholesale
23 ruling that redactions of this nature are inappropriate. That
24 they can be done if there's both the relevancy argument and
25 the highly confidential concerns that have been expressed in

1 the opposition or in the defendant's position. I am not
2 convinced that the identity of this client is relevant to be
3 honest with you. I -- I've gone back and forth in trying to
4 figure out how that could come into play in the trial of this
5 case.

6 And, you know, I understand there is a claim for
7 punitive damages, but I really -- I don't see how exploring
8 one additional client's contract, beliefs, statements,
9 understandings, particularly given the sensitive nature of --
10 and I think the defendant did a good job in explaining how
11 sensitive it is to the client that that information that he
12 has agreed or has signed onto an agreement to do this not be
13 disclosed outside of people who have agreed to keep it
14 confidential under the terms of a written agreement like that.
15 It really is of a pretty sensitive nature to him to do that.

16 I just -- I don't see how that information is
17 sufficient enough to overcome those concerns in this case. So
18 I'm going to -- the secondary reason is, you know, this
19 really -- if these documents were produced, there really is --
20 the timeliness of this motion comes into play. Discovery ends
21 today. There wouldn't be any ability to do any discovery as
22 to this person to find out any information that he may have
23 conversations that he may have had understandings, beliefs,
24 those kinds of things. The idea that we could possibly
25 subpoena that person to show up at trial, I think, is not a

1 very strong argument.

2 We have no idea whether he's in Virginia. I suspect
3 even if he was to agree to voluntarily discuss the issues with
4 the parties, you know -- I don't see that being something that
5 is very likely under the circumstances.

6 So for those reasons I'm going to deny the motion to
7 compel and see how things work out from here on out.

8 MR. PUSCH: Your Honor, if I may follow up on one
9 other point. Just with regards to discovery. The parties
10 have agreed to -- the plaintiff has allowed the defendant to
11 take untimely depositions next week and the week after. So
12 I -- to the extent that it might change your opinion, I would
13 say that we are going into discovery beyond the discovery
14 deadline by agreement of the party's.

15 THE COURT: Can't do it. Can't do it. You know if
16 something happens, that has not been agreed to by the Court.
17 And the rules are clear. Continuances aren't done by the
18 parties, only by the Court. So that is at everyone's peril.

19 MR. PUSCH: The deposition is after the fact --

20 THE COURT: Any discovery after the discovery cutoff
21 date without the Court approval of that. And so, you know, if
22 for some reason you want to try and get some cover on that,
23 you can put together a consent order asking that these
24 depositions be taken after the discovery cutoff date so that
25 you can be comfortable that, you know, you'll be able to do

1 what you've now agreed to do.

2 I don't know where anybody would have thought that
3 the idea of we can agree to extend the discovery cutoff date
4 would fly in this court.

5 MR. PUSCH: Understood. To be clear, we are not
6 taking any of these depositions.

7 I guess the other question that I have is, would it
8 be -- would Your Honor be open to at least a confirmation that
9 the -- this lunar client is outside of the subpoena power of
10 the Court for trial? If we could have a designee -- just a
11 confirmation from the -- if that would sway the Court's
12 decision. Just an idea.

13 THE COURT: Well, I -- I'm not sure what you're
14 asking for.

15 MR. PUSCH: If the defendants would submit something
16 confirming that the individuals not outside -- it is outside
17 the subpoena power, or if the individual is within the
18 subpoena power if that would sway the Court's opinion on this
19 order one way or the other. I suspect he is not anyway.

20 THE COURT: Yeah, I'm not -- not to ensure that's
21 giving more information than for question that some
22 information be provided in a language other than English for
23 him to understand. I mean I'm -- but --

24 MR. PUSCH: Fair enough.

25 THE COURT: What's the defendant's position on

1 indicating whether the person resides within the subpoena
2 power of this court?

3 MR. POTEAT: I don't think that's proper or
4 necessary. Of course we can do that, but --

5 THE COURT: Well, honestly, I'm not sure that would
6 necessarily sway my ruling. I mean my ruling is whether,
7 relevant or not -- under the circumstances I'm really not
8 comfortable that his information would be as significant as
9 the plaintiff indicates it may be under the circumstances.

10 Okay. What's going on on discovery now? And I'm
11 kind of shocked that Williams & Connolly would think that they
12 could agree to do discovery outside of the discovery period
13 without the Court's approval.

14 MR. POTEAT: The issue that arose was with the
15 ruling on February 9th with opening -- with opening up
16 subsequent documents for production. We attempted to schedule
17 them all before the end of the discovery cutoff because of the
18 scheduling issues on the other side, we were not able to do
19 that. And so while understanding that there's no cover from
20 the Court with what happens with that, we thought that was
21 better than nothing in keeping the case on track.

22 We also agreed and I don't know -- the other side is
23 taking a deposition of our expert tomorrow. And so it was
24 a -- it was a time crunch that we were trying to deal with
25 while keeping the summary judgments schedule on track, Your

1 Honor.

2 THE COURT: What are the current dates that you have
3 with -- with Judge Ellis?

4 MR. POTEAT: March 13th is the date for motions,
5 summary judgment, Daubert, all the other motions. And then I
6 think two weeks after that are the oppositions and replies.
7 And the motions hearing is on April 6th.

8 THE COURT: So is the final pretrial conference
9 still set for March?

10 MR. POTEAT: April 27th.

11 THE COURT: Okay.

12 MR. POTEAT: I think it's April 27th off the top of
13 my head.

14 THE COURT: And what is your -- so the depositions
15 that you've agreed to do don't alter any of those other dates,
16 is that right?

17 MR. POTEAT: That's correct, Your Honor.

18 THE COURT: Well, what I would suggest that, if you
19 want to, is just put together a short order, consent order
20 that the party's have agreed to take the following depositions
21 at dates and times that you've agreed to do and indicate in
22 there that it has -- will not alter any of the other dates
23 that have been set by the district judge for briefing with a
24 final pretrial conference. I'll sign it and we can all sleep
25 a little bit better knowing that that's -- follow the right

1 procedure, okay.

2 MR. POTEAT: Thank you, Your Honor. I just had one
3 other issue given that today is the official close of
4 discovery and given that Mr. Mawdsley, who is the issue in the
5 earlier motion and is actually being deposed today at Williams
6 & Connolly across the river. But a dispute arose in
7 connection with a communication with Mr. Mawdsley
8 communicating to certain witnesses in this case shortly before
9 their depositions, and we've been trying to get an
10 understanding of the nature of that communication. It hasn't
11 been crystal clear what it was. But last night it was
12 produced, yesterday evening, and it was Mr. Mawdsley
13 communicating with three of the witnesses, fact witnesses for
14 Mr. McPike, that we deposed in this case sending them
15 documents.

16 One appears to be the amended complaint. They
17 produced the cover e-mail, but not the documents that were
18 transmitted with that. But there appear to be 250 other pages
19 of documents that were transmitted as well to these witnesses.
20 And so you have a nonlawyer transmitting materials from this
21 case right before depositions of these three witnesses. We've
22 asked that they produce those documents and they have not
23 agreed to do so. And so we did want to raise that issue.
24 We're happy to go through the process of briefing it, but
25 because Mr. Mawdsley resides in New Zealand and we would

1 prefer not to have to bring him back at any point to answer
2 questions about his communications with witnesses prior to
3 their depositions, we thought it prudent to raise now in the
4 matter of efficiency.

5 THE COURT: You know I'm willing to hear what you
6 want to say. I'm not sure I'm willing to resolve it.

7 What is the situation?

8 MR. PUSCH: So, Your Honor, what this -- what
9 happened here is that one witness testified that he was sent a
10 document that he browsed through that he explicitly testified
11 did not refresh his recollection. He couldn't describe it.
12 He didn't learn anything from it. He doesn't really remember
13 anything about it. That kind of spurred this interest in like
14 oh, what's this document. We've been working with the other
15 side, because first of all, it was a document that originated
16 with counsel. Counsel put together some documents for Mr.
17 McPike to review. I'm unclear that he actually did. And then
18 that was sent by Mr. Mawdsley to other witnesses.

19 Now they've asked all of these individuals, and I
20 suspect they're asking Mr. Mawdsley as we speak: What have
21 you communicated with? What have you sent people? They're
22 welcome to ask those questions. But all these other witnesses
23 have testified, have not testified that they looked at any of
24 these documents. They didn't refresh their recollection.
25 They have no basis for seeking it. It's work product. It's

1 not right. There's no motion filed for it. We've maintained
2 work product over the content of that information because it
3 was put together by attorneys, selected documents, and that
4 work product privilege remains because it hasn't been
5 disclosed to an adverse party.

6 And so, first of all, I don't think it's ripe for
7 discussion right now. And, you know, we've worked closely
8 with them to lay their -- just to kind of confirm like look,
9 the 50-page document he referenced that he doesn't recollect,
10 this e-mail will give you confirmation of what it is. But
11 that's it. So I don't know --

12 THE COURT: Well, you know, I -- the one-week motion
13 gives people an opportunity to put things in front of the
14 Court fairly quickly. It gives the Court an opportunity to
15 look at it and consider it and not try to make a decision
16 based on, you know, back and forth in oral discussions.
17 Honestly, I -- I like to read stuff, make sure I understand
18 what the work product issue would be involved, if there is a
19 work product issue involved. If it was a simple one that if
20 he's going to be deposed here or there, I can usually deal
21 with those in an off-the-cuff oral basis. But if we're
22 getting too deep, I want to be able to look at it and make a
23 considered decision as opposed to sort of a seat-of-the-pants
24 decision on that.

25 So I appreciate the heads up. Hopefully you all can

1 work it out, but if you can't, then I'll consider it in due
2 course.

3 MR. PUSCH: And, Your Honor, with regards to other
4 depositions, I think there may be, assuming the parties can't
5 come to an agreement today, there may be a motion for
6 reopening deposition for documents produced. But we will be
7 filing --

8 THE COURT: And I -- you know, I encourage counsel
9 to work together, but I want you to be protected in case
10 something happens. And, you know, I don't want to be in the
11 position of somebody coming in two weeks from now and saying I
12 was doing a deposition last week and so-and-so happened and
13 you know it -- the argument is that deposition wasn't really
14 sanctioned by the Court and I'd be in a position to say,
15 "Sorry, I can't do anything about it. You were doing
16 something off the books, so to speak."

17 So protect yourself and it will help protect me as
18 well.

19 Okay. Thank you. Court will be adjourned.

20

21 (Proceedings adjourned at 11:10 a.m.)

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CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Motion Hearing in the case of the **HARALD McPIKE versus ZERO-GRAVITY, et al**, Civil Action Number 1:17-CV-562, in said court on the 23rd day of February, 2018.

I further certify that the foregoing 34 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this the March 8, 2018.



Tonia M. Harris, RPR
Official Court Reporter